United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7350

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MEAT SYSTEMS CORPORATION,

Plaintiff-Appellee,

—against—

BEN LANGEN-MOL, INC., a New York corporation, HOMBURG, B.V. and KNUD SIMONSEN INDUSTRIES, LTD.,

Defendants,

—and—

BEN LANGEN-MOL, INC., a Delaware corporation,

Applicant for Intervention-Appellant,

—and—

CARL ADILETTI and STEPHEN ZITIN,

Additional Defendants on Counterclaim-Appellees.

REPLY BRIEF OF APPLICANT FOR INTERVENTION-APPELLANT

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Applicant for Intervention-Appellant, Ben Langen-Mol, Inc., a Delaware corporation ("Belam-Delaware") submits this brief in reply to the brief of appellees and in support of its appeal from the order of Hon. Whitman Knapp entered on July 27, 1976.

Preliminary Statement

Appellees take issue with Belam-Delaware's view of the issue presented by this appeal. At page iv of their brief, they set forth five issues, which they contend are presented by this appeal. The body of appellees' brief is divided into five principal divisions, addressed respectively to each of the said issues. We believe appellees' arguments to be without merit for the reasons discussed seriatim below.

Argument

I.

THIS COURT HAS JURISDICTION BECAUSE THE ORDER FROM WHICH BELAM-DELAWARE APPEALS DENIED ITS APPLICATION FOR A PRELIMINARY INJUNCTION AND WAS OTHERWISE A FINAL ORDER

Appellees challenge the jurisdiction of this Court. They appear to argue that,because the District Court's order denying so much of Belam-Delaware's motion below as sought intervention* was without prejudice to renewal in

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* At page 2 of their brief, appellees incorrectly characterize Belam-Delaware's application below. Appellees state that "the proposed intervenor filed an Order to Show Cause for Intervention coupled with a Motion for Preliminary Injunction." In fact, Judge Conner entered an order directing appellees to show cause why an order should not be entered (a) granting Belam-Delaware leave to intervene as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure and (b) granting Belam-Delaware preliminary injunctive relief against appellees pursuant to Rule 65(a) of the Federal Rules of Civil Procedure. (A-4,5).

September, it is not a "final", and hence an appealable order. Appellees argue that, having denied Belam-Delaware's application for intervention, the District Court was then without jurisdiction to consider so much of Belam-Delaware's motion below as sought preliminary injunctive relief against them. Therefore, appellees submit that the entire transcript of the proceeding before the District Court constitutes mere dicta, indicating at best the District Judge's "predilection concerning what he would do on a preliminary injunction motion if jurisdiction were obtained." (Brief of Appellees, p. 8).

In support of their theory appellees rely exclusively on three cases*, which even cursorily read belie appellees' argument and clearly support the jurisdiction of this Court. Appellees concede, at page 3 of their brief, "that substance is to govern over form," in determining whether an order is appealable. They also concede that the authority they cite in support of their challenge to this Court's jurisdiction stands for no other proposition.

A. The District Court's order denying Belam-Delaware's application for intervention because of laches is, a fortiori, a final order.

Appellees contend that the denial by the District

* Azar, et al., v. Conley, et al., 480 F.2d 220 (6th Cir. 1973); Spangler v. United States, 415 F.2d 1242 (9th Cir. 1969); and Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972).

Court of Belam-Delaware's application for intervention because of laches, without prejudice to renewal, is not a final order. As stated in our main brief, at page 3, we fail to perceive (and appellees do not suggest) how the infirmity of laches could possibly be cured by the further passage of time. Therefore, since the articulated basis for the District Court's denial of Belam-Delaware's application for intervention could not possibly be remedied in the future, so much of the District Court's order as denies Belam-Delaware's application for intervention is unquestionably a final order.

B. The "substance" of the order from which Belam-Delaware appeals constitutes the denial of its application for preliminary injunctive relief against appellees.

The "substance" of the proceeding below was the denial by the District Court, based on laches of Belam-Delaware's application for preliminary injunctive relief against appellees. So much of the motion below as sought intervention was merely the procedural vehicle to bring before the District Court, which also had before it Meat Systems'* action seeking to declare the '860 Patent invalid, Belam-Delaware's application to enjoin infringement thereof by appellees, which it claimed was causing it to suffer irreparable injury. Putting aside for the moment any question regarding "laches", or "timeliness", it is clear that in-

* This brief adopts the terms defined in appellant's main brief.

tervention below was the proper and responsible manner for Belam-Delaware to bring its application for relief before the District Court.

The record shows that the District Court recognized that the real issue before it was Belam-Delaware's application for a preliminary injunction, as is evidenced by the following statement:

> "I am not arguing the application to intervene. It may be timely, but you do not do it on a two-day notice of an order to show cause."
>
> (A-152).

This statement by the District Court is also significant, because it indicates the District Court's awareness of the distinction between "laches", which may be a basis for the denial of an application for a preliminary injunction, and "timeliness", which may be a basis for the denial of an application for intervention. National Ass'n for the Advancement of Colored People v. State of New York, 413 U.S. 345, 366-69 (1973); Chase Manhattan Bank (Nat. Ass'n) v. Corporation Hotelera de Puerto Rico, 516 F.2d 1047 (1st Cir. 1974); Hoehn v. Crews, 144 F.2d 665 (10th Cir. 1944), aff'd on other grounds sub. nom. Garber v. Crews, 324 U.S. 200 (1945); Cabrera v. Board of Elections of Camden County, 350 F. Supp. 25 (D. N.J. 1972).

Appellees contend that the District Court decided (a) as a matter of "calendar control" not to entertain for several months so much of the motion below as sought intervention and (b) to permit its decision on so much of the

motion below as sought a preliminary injunction to abide by its decision on the intervention application. Appellees urge that the District Court adopted a leisurely approach to the resolution of Belam-Delaware's application for a preliminary injunction, notwithstanding the fact that Belam-Delaware claimed to be suffering daily irreparable harm by reason of unlawful conduct of appellees, which it sought to enjoin.

That argument, we submit, is absurd. Although we disagree with Judge Knapp's order for the reasons discussed in our main brief, it is clear from the text of his order, which denies the "motions" (A-148c) before him, together with the transcript of the hearing that the substance of the order from which Belam-Delaware appeals is the refusal of Judge Knapp to grant its application for a preliminary injunction because of laches. Having so ruled, the intervention question concedely became relatively academic.

In our view, to argue that, as a matter of "calendar control," Judge Knapp decided not to consider Belam-Delaware's application for a preliminary injunction for several months does him a grave injustice.

Viewed most favorably to appellees, the District Court's order refused until September to make a formal ruling on Belam-Delaware's application for a preliminary injunction. Clearly its order had the effect of denying Belam-Delaware's request for injunctive relief, which thereby renders it an appealable order pursuant to 28 U.S.C.

§ 1292(a)(1). McCoy v. Louisiana State Bd. of Educ., 332 F.2d 915 (5th Cir. 1964); Kennedy v. Lynd, 301 F.2d 818 (5th Cir.), cert. denied, 371 U.S. 893 (1962); Wright & Miller, Federal Practice and Procedure: Civil § 2962.

In their brief, appellees make much of the relatively short period of time between the entry of the order to show cause by Judge Conner (A-4) and the hearing before Judge Knapp (A-149). It should be observed that Judge Conner signed the order to show cause on July 23, 1976 (A-4), because of unavailability at the time of Judge Knapp, and set the matter down for hearing before Judge Knapp after having consulted Judge Knapp's chambers to determine his availability during the summer months. It should also be observed that Belam-Delaware acknowledged the unfortunate compression of time (A-152), but, nevertheless, maintained that it was (a) suffering irreparable harm, (b) entitled to a preliminary injunction, and (c) stood fully prepared to proceed to prove that it was entitled to the extraordinary relief it sought. As discussed in detail in our main brief, because of its finding of a bar by reason of laches, the District Court never considered the merits of Belam-Delaware's application for preliminary injunction.

Accordingly, this Court has jurisdiction to review the District Court's order pursuant to 28 U.S.C. §§1291 and 1292(a)(i), because that order is (a) a final order, which in substance (b) denies Belam-Delaware's application for a preliminary injunction. Azar, et al., v. Conley, et al., 480

F.2d 220 (6th Cir. 1973); Spangler v. United States, 415 F.2d 1242 (9th Cir. 1969); and Yuffe v. Powers, 454 F.2d 1362 (1st Cir. 1972).

C. Appellees' challenge to the District Court's jurisdiction to entertain Belam-Delaware's application for a preliminary injunction exalts form over substance.

Appellees argue that, having once denied Belam-Delaware's application for intervention, the District Court lacked jurisdiction to entertain so much of Belam-Delaware's motion as sought preliminary injunctive relief against appellees. Appellees do not suggest that the District Court lacked subject matter jurisdiction over the claims attempted to be asserted by Belam-Delaware, nor do they argue that venue was improper. Furthermore, they do not contend, because they cannot, that they lacked actual notice of (a) the nature of Belam-Delaware's claims and (b) its application for preliminary injunctive relief.

Therefore, appellees' argument that the District Court lacked jurisdiction to consider Belam-Delaware's application for a preliminary injunction is reduced to the highly technical and insubstantial objections that Belam-Delaware failed (a) to pay a $15.00 filing fee to the Clerk of the District Court and (b) to serve a standard form of summons upon appellees.

II.

THE DISTRICT COURT'S ORDER DENYING INTERVENTION WAS CLEARLY ERRONEOUS.

At page 9 of their brief, appellees enumerate six reasons why they contend intervention should not have been permitted. They argue that the District Court's order was neither clearly erroneous nor an abuse of its discretion. Since Belam-Delaware moved below to intervene as of right, pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, a fortiori the District Court had no discretion as to whether or not to permit intervention, and, therefore, no question of abuse of discretion is presented by this appeal insofar as the intervention issue is involved. For reasons discussed in our main brief, the District Court's denial of Belam-Delaware's application for intervention was clearly erroneous.

A. Fundamental due process was not violated by Judge Conner's order.

As suggested above at pages 5 and 6, Belam-Delaware did not request that Judge Conner set down the hearing on its application on such short notice. More significantly, appellees' counsel did not request, and, therefore were not denied, a reasonable extension of time.

The substantive issues presented by Belam-Delaware below, viz., the validity of the '860 Patent and appellees' infringement thereof, were raised in the first in-

stance by appellees. Consequently, since they can hardly claim surprise with respect to those issues, they attempt to divert the attention of this Court to a non-issue -- the intervention question.

Their protestations to the contrary notwithstanding, there was nothing for appellees to "pursue" with respect to Belam-Delaware's intervention. More importantly, in view of the phantom problems purportedly arising from the Belam-New York/Belam-Delaware transaction, appellees fail to show how they could possibly have been prejudiced by the presence of Belam-Delaware in the action. Indeed, Belam-Delaware's presence, which would readily permit appellees to assert such claims against Belam-Delaware as they may believe appropriate, would appear to be in appellees' best interest.

B. Appellees' interests are not adequately represented by Homburg or Belam-New York.

Because appellees attempt neither to deal with the issues nor to controvert the authorities discussed at length in our main brief at pages 11 to 13, we respectfully submit that, for the reasons there discussed, it is clear that Belam-Delaware's interests were not and are not being adequately represented by others. Appellees offer no authority to the contrary.

C. Belam-Delaware's application below did not raise any standing issue.

At page 9 of their brief, appellees state that "...since the patentee, Homburg, was seeking to be dismissed for lack of jurisdiction, it was questionable as a matter of law whether the alleged exclusive licensee (proposed intervenor) had standing to enforce the patent." Appellees say nothing further with respect to this so-called argument advanced below, much less cite any authority in its support. Therefore, because we fail to perceive its legal basis and because it was not articulated below, we find this argument to be both factually and legally unfounded rhetoric and submit that it should be dismissed as such by this Court. Lemley v. Christopherson, 150 F.2d 291 (5th Cir. 1945); United States v. Chesapeake & O. Ry., 281 F.2d 698, 3 F.R.Serv.2d 75h.2, Case 1 (4th Cir. 1960); Lillycrop v. Kinsky, 300 F.2d 736 (D.C. Cir. 1962); Cox v. General Elec. Co., 302 F.2d 389 (6th Cir. 1962).

D. The tenth and fifth causes of action of the amended complaint are the only aspects of the litigation with respect to which Belam-Delaware may intervene as of right.

Appellees argue that the District Court should not have permitted so-called "selective intervention". In support of this novel theory they argue at page 14 of their brief:

> "Appellees also opposed intervention on the ground that the Court should not grant the selective intervention sought by the Appellant. Specifically, as one viewed the proposed Answer and Counterclaims of Belam-Delaware, attached to the Order to Show Cause papers, it was clear that Belam-Delaware sought to intervene as a defendant only with respect to the Fifth and Tenth Causes of Action pleaded by the plaintiff, Meat Systems. Since these causes of action are essentially a declaratory judgment seeking a holding of patent invalidity and non-infringement, an intervention by Belam-Delaware as a nominal defendant effectively would have placed Belam-Delaware in the position of a party plaintiff seeking to enforce the patents.
>
> However, Belam-Delaware did not seek to intervene with respect to the remaining causes of action lodged against Belam-New York, which causes of action seek a holding of liability, compensatory and punitive damages, etc., as against Belam-New York."
>
> (emphasis added)

The averments to which appellees refer, which purport to establish the liability of Belam-New York to Meat Systems, have been denied by Belam-New York.

Appellees fail to suggest how and upon what legal basis Belam-Delaware could intervene as to those causes of action asserting liability against Belam-New York.

Appellees' argument, followed logically, does not lead to any rational conclusion. Surely appellees do not suggest that, in order to intervene, Belam-Delaware must say that it is liable to Meat Systems for the liability of Belam-New York, which Belam-New York denies. If that is so, what possible purpose would be served by Belam-Delaware's intervening and responding to causes of action in which all claims for relief relate to other entities?

The conclusion is inescapable, we submit, that ap-

pellees' so-called selective intervention theory is but yet another attempt to obfuscate the real issues before this Court.

E. Appellees' "best evidence" argument is belied by the facts before the District Court.

Appellees contend that there was no admissible evidence before the District Court to establish that Belam-Delaware succeeded to the business of Belam-New York. In support of that argument, appellees rely on Rule 1002 of the Federal Rules of Evidence, more commonly known as the "Best Evidence Rule". In view of the compressed time period, which worked even a greater hardship on counsel for Belam-Delaware, who were obliged to prepare reply papers to the morass of papers served upon them by counsel for appellees within eighteen hours, Belam-Delaware responded to appellees' best evidence argument advanced below by producing in Court Ben G. Langen, who signed the documents on behalf of Belam-Delaware relating to the Belam-Delaware/Belam-New York transaction, together with the documents themselves. Accordingly, that argument as well is totally without merit.

F. No issue was raised below with respect to the use of prior discovery.

At page 9 of their brief, appellees contend that intervention was opposed "unless some procedure was developed

by which prior discovery could be usable". Once again appellees raise a non-issue. Assuming that, having intervened, Belam-Delaware would have a right to object to the use of such discovery, no such objection was made at any time by Belam-Delaware as to the use of prior discovery. More importantly, appellees did not raise this point with Belam-Delaware or its counsel either prior to or at the hearing.

Appellees did not, because they could not, point to anything in the record before this Court in support of their final argument in opposition to intervention.

III.

IT WAS CLEARLY ERRONEOUS FOR THE DISTRICT COURT TO DENY BECAUSE OF LACHES SO MUCH OF BELAM-DELAWARE'S MOTION BELOW AS SOUGHT INTERVENTION.

Appellees entirely fail to respond to the authorities discussed at length by Belam-Delaware at pages 9 through 11 of its main brief, which clearly establish as a matter of law that, because issue had not yet been joined below, Belam-Delaware's application for intervention was timely. In particular, appellees failed to come to grips with the teaching of Kozak v. Wells, 278 F.2d 104 (8th Cir. 1960); Mullins v. De Soto Secs. Co., 3 F.R.D. 432 (D.C. La. 1944); Brennan v. Connecticut State UAW Community Action Program Council, 60 F.R.D. 626 (D.C. Conn. 1973); Wright & Miller, Federal Practice & Procedure, Civil § 1916.

Furthermore, particularly in view of appellees'

tactics on appeal, it is significant that appellees did not below and do not now intimate that Belam-Delaware's intervention would impede in any way the progress of the litigation or otherwise prejudice the rights of the original parties, which under governing case law are the most important issues for the Court's consideration. See, e.g., McDonald v. E. J. Lavino Co., 430 F.2d 1065, 1073 (5th Cir. 1970); McCausland v. Shareholders Management Co., 52 F.R.D. 521 (S.D.N.Y. 1971); Monarch Asphalt Sales Co. v. Wilshire Oil Co. of Texas, 511 F.2d 1073 (10th Cir. 1975).

IV.

THE DENIAL BY THE DISTRICT COURT OF BELAM-DELAWARE'S APPLICATION FOR PRELIMINARY INJUNCTION WAS CLEARLY ERRONEOUS.

Appellees fail to address Section IIA of our main brief. Therefore, we conclude that they concede that the showing of irreparable harm is a sine qua non of any application for preliminary injunction, including an application for preliminary injunction in the patent case.

Upon that assumption, we fail to perceive how Belam-Delaware could be guilty of laches when it concededly and indisputedly applied for preliminary injunction enjoining the unlawful conduct of appellees within several days of learning of the Morrell Order, which, for the first time, enabled it to meet its burden of showing irreparable harm.

CONCLUSION

For the foregoing reasons, this Court should enter an order (a) reversing the order of the District Court (b) ruling that Belam-Delaware is entitled to intervene in this action as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, (c) remanding this action to the District Court for its expedited consideration of Belam-Delaware's application for a preliminary injunction and (d) directing that in connection therewith an evidentiary hearing be held.

Dated: New York, New York
September 20, 1976

Respectfully submitted,

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-and-	:	
CARL ADILETTI and STEPHEN ZITIN, Additional Defendants on Counterclaim-Appellees.	:	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

OLGA M. LOPEZ, being duly sworn, deposes and says:

1. I am not a party to this action, I am over 18 years of age and reside at 1561 Metropolitan Avenue, Bronx, New York 10462. On the 20th day of September 1976, I served two copies of the Reply Brief of Applicant for Intervention -

Appellant upon Bell, Wolkowitz, Beckman & Klee, attorneys for plaintiff-appellee and additional defendants on counter-claim-appellees by personally delivering them to their offices at 501 Madison Avenue, New York, New York 10022.

2. I served the said documents upon Browdy and Neimark, attorneys for defendant Homburg B.V., and upon Brooks Haidt Haffner & Delahunty, attorneys for defendant Knud Simonsen Industries Ltd. by placing them in an official depository of the U.S. Postal Service in postage paid wrappers addressed to their respective offices at Munsey Building, Washington, D. C. 20004 and 99 Park Avenue, New York, New York 10017.

Olga M. Lopez

Olga M. Lopez

Sworn to before me this
20th day of September 1976

J. Joseph Bainton

Notary Public

J. JOSEPH BAINTON
NOTARY PUBLIC, STATE OF NEW YORK
No. 31 4 [illegible]
Qualified in New York County
Commission Expires March 30, 19 78